

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GARY BOLTON, as Trustee of the)
Arthur A. Bolton Revocable Trust) No. 05-1109 SC
Dated May 20, 2000, the Trust A -)
Marital Trust, and Trust B - Family)
Trust, and as Executor of the) ORDER GRANTING
Estate of Arthur Bolton,) PLAINTIFF'S MOTION
Plaintiff,) FOR SUMMARY JUDGMENT
AND DENYING
v.) DEFENDANT'S CROSS-
MOTION FOR SUMMARY
JUDGMENT
LUMBERMANS MUTUAL CASUALTY COMPANY,)
an Illinois corporation,)
Defendant.)

I. INTRODUCTION

Plaintiff Gary Bolton ("Plaintiff" or "Bolton") filed this action on March 17, 2005 against Defendant Lumbermans Mutual Casualty Company ("Defendant" or "Lumbermans") seeking, inter alia, to compel Lumbermans to defend Bolton against a pending lawsuit brought by the City of Redwood City against Bolton (the "Redwood City action") for costs and damages resulting from the release of toxic chemicals into the soil beneath a shopping center in Redwood City, California. Bolton has filed a motion for summary judgment seeking a judicial determination establishing Defendant's duty to defend him in connection with the Redwood City action. Lumbermans has filed a cross-motion for summary judgment seeking a ruling declaring that they do not owe Bolton a duty to defend and that their refusal to defend Bolton was therefore not

1 in bad faith, as Bolton has alleged in his Complaint. After
2 having considered the arguments and evidence submitted by the
3 parties, the Court hereby DENIES Defendant's motion and GRANTS
4 Plaintiff's motion.

5 **II. BACKGROUND**

6 Beginning in the early 1940s, Arthur Bolton operated a dry
7 cleaning business known as "Roy's" on property he owned at 1100 El
8 Camino Real, Redwood City, California. See Defendant's Memorandum
9 in Support of Motion for Summary Judgment at 4 ("Def. Mem.");
10 Plaintiff's Memorandum in Support of Motion for Summary Judgment
11 at 1 ("Pl. Mem."). In 1970, Arthur Bolton sold the dry cleaning
12 business to Eno Barbitta ("Barbitta"), but retained ownership of
13 the real property on which Roy's was situated. See Deposition of
14 Eno Barbitta at 7:7-13 ("Barbitta Depo").

15 Barbitta leased the property from Arthur Bolton during the
16 time he owned Roy's, a period that ended in 1983 when Barbitta
17 sold Roy's to Bong Ho Lee and Bok Nim Lee.¹ Id. at 8:13-16; Pl.
18 Mem. at 2. As a part of the lease agreement, Barbitta was
19 obligated to procure a comprehensive general liability insurance
20 policy, naming Arthur Bolton as an additional named insured with
21 respect to all operations undertaken at the property on which
22 Roy's was located. See Pl. Mem. at 2. For the years 1981-82 and
23 1982-83, Barbitta procured such insurance coverage with
24 Lumbermans, naming Arthur Bolton as a named additional insured
25 under policy numbers 1SJ 050 583 and 2SJ 050 583 (collectively,

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27 ¹ Neither of these individuals is involved in the instant
28 dispute.

1 the "Lumbermans Policies"). Id.

2 In the 1990s, the California Regional Water Quality Control
3 Board ("CRWQCB") began investigating the contamination of soil and
4 groundwater in the vicinity of the Sequoia Station Shopping
5 Center, located across El Camino Real from Roy's. See Complaint,
6 City of Redwood City v. Arthur Bolton, No. C-02-2705 at 1
7 ("Redwood City Complaint"). Specifically, laboratory tests of
8 groundwater, soil, and gas from around Sequoia Station have
9 allegedly revealed "contamination by various hazardous substances,
10 primarily tetrachloroethene (PCE), trichloroethene (TCE), and
11 dichloroethene (DCE)." Id. at 2. As a result, the City of
12 Redwood City filed suit against Arthur Bolton on June 5, 2002,
13 seeking cost recovery, contribution, and declaratory relief under
14 the Comprehensive Environmental Response, Compensation, and
15 Liability Act ("CERCLA"), as well as bringing several state law
16 claims. Id. at 5-11. In July 2003, Redwood City amended its
17 Complaint to reflect the fact that Arthur Bolton was deceased, and
18 that the proper Defendant in the Redwood City action was therefore
19 Arthur Bolton and Gary Bolton, as Trustee of two revocable trusts
20 dated May 20, 2000. See Amended Complaint, City of Redwood City
21 v. Arthur Bolton, No. C-02-2705 SC ("Redwood City Amended
22 Complaint").

23 Bolton, through his attorney, tendered his defense of the
24 Redwood City action to Lumbermans under the Lumbermans Policies in
25 June 2002, and again tendered defense of the Redwood City action
26 to Lumbermans in August 2003 after Redwood City filed its Amended
27 Complaint. See Declaration of David Isola ¶6 ("Isola Decl."). By
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1 letter dated March 21, 2005, Lumbermans, through its third party
2 claim administrator, Cavell USA, Inc., declined to defend or
3 indemnify Bolton in the Redwood City action. See Declaration of
4 Tiffany Troisi, Ex. 2 ("Troisi Decl."). In refusing to defend or
5 indemnify Bolton in the Redwood City action, Lumbermans relied on
6 the fact that the Lumbermans policies contained an exclusion for
7 "environmental property damage resulting from the releases of
8 chlorinated solvents by the dry cleaning operations on the Bolton
9 property into the sanitary sewer line." Id. at 2. Furthermore,
10 while acknowledging that the environmental property damage
11 exclusion does not apply where the "discharge, dispersal, release
12 or escape is sudden and accidental," Defendant asserted in its
13 denial of coverage that "the allegations against Bolton in the
14 [Redwood City action] do not contain any assertions whatsoever
15 that there were ever any "sudden" or "abrupt" releases of the
16 chlorinated solvents at issue, nor that the contamination was
17 caused as a result of any 'sudden and accidental' releases." Id.
18 at 3.

19 Subsequently, on May 26, 2005, counsel for Plaintiff sent a
20 letter to counsel for Lumbermans, encouraging Lumbermans to
21 reconsider its denial of coverage in light of the information
22 discovered during the deposition of Barbitta, conducted May 4,
23 2005. See Troisi Decl. Ex. 4 & 5. Bolton apparently felt that
24 Barbitta's deposition revealed several ways in which the hazardous
25 substances found in the vicinity of the shopping center may have
26 been discharged into the sewer line through activities at Roy's
27 that fall within the "sudden and accidental" exception to the
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1 environmental property damage exclusion to the Lumbermans
2 Policies. Id. This effort was evidently unavailing, as the
3 parties have filed cross-motions for summary judgment seeking a
4 judicial determination of the rights and duties accorded the
5 parties under the Lumbermans Policies and applicable law.

6 **III. LEGAL STANDARD**

7 Under Federal Rule of Civil Procedure 56(c), summary judgment
8 shall be granted where the "pleadings, depositions, answers to
9 interrogatories, and admissions on file, together with the
10 affidavits, if any, show that there is no genuine issue as to any
11 material fact and that the moving party is entitled to judgment as
12 a matter of law." Similarly, summary judgment is warranted
13 "against a party who fails to make a showing sufficient to
14 establish the existence of an element essential to that party's
15 case, and on which that party will bear the burden of proof at
16 trial...since a complete failure of proof concerning an essential
17 element of the nonmoving party's case necessarily renders all
18 other facts immaterial." Celotex Corp. v. Catrett, 477 U.S. 317,
19 322-23 (1986).

20 A genuine issue of fact exists where the non-moving party
21 produces evidence on which a reasonable trier of fact could find
22 in its favor viewing the record as a whole in light of the
23 evidentiary burden the law places on that party. Anderson v.
24 Liberty Lobby, Inc., 477 U.S. 242, 252-56 (1986). The Court's
25 role in adjudicating a motion for summary judgment is not to make
26 credibility determinations, and the "evidence of the non-moving
27 party is to be believed, and all justifiable inferences are to be
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drawn in its favor." Id. at 255.

IV. DISCUSSION

Under California law, an insurer has a duty to defend an insured against claims brought against the insured, so long as at least one of the claims "potentially seeks damages within the coverage of the policy." Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 275 (Cal. 1966); see also Montrose Chemical Corp. v. Superior Court, 6 Cal. 4th 287, 295-96 (Cal. 1993); Vann v. Travelers Companies, 39 Cal. App. 4th 1610, 1614 (Cal. Ct. App. 1995). The duty to defend is considerably broader than the duty to indemnify, and therefore will obligate the insurer to defend against claims in which no damages are ultimately awarded. See Horace Mann Ins. Co. v. Barbara B., 4 Cal. 4th 1076, 1081 (Cal. 1993). "Facts merely tending to show that the claim is not covered, or may not be covered but are insufficient to eliminate the possibility that the resultant damages (or the nature of the action) will fall within the scope of coverage, therefore add no weight to the scales." Montrose, 6 Cal. 4th at 300.

In practice, the insured will satisfy his initial burden by demonstrating that a bare possibility for coverage exists, even if the evidence suggests, but does not conclusively establish, that the loss is not covered. See id. at 299-300. In assessing whether such a bare possibility for coverage exists, the insurer shall make reference to the terms of the policy, the pleadings, and any additional evidence available to the insurer at the time of tender. See id. at 296; Vann, 39 Cal. App. 4th at 1614-15.

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If the insured succeeds in carrying his initial burden of demonstrating the potential for coverage, the insurer may avoid being bound by the duty to defend only by showing that the third party claims cannot possibly fall within the scope of the policy. See Montrose, 6 Cal. 4th at 295; Vann, 39 Cal. App. 4th at 1614. At the summary judgment stage, an insurer must be able to negate coverage as a matter of law. See Maryland Cas. Co. v. National American Insurance Co. of Calif., 48 Cal. App. 4th 1822, 1832 (Cal. Ct. App. 1996).

A. Lumbermans's Motion for Summary Judgment

Lumbermans essentially makes three arguments in support of its motion for summary judgment. First, Lumbermans argues that the pleadings and additional evidence available at the time of tender do not reveal any potential way in which Bolton could be covered by the Lumbermans Policies.² Def. Mem. at 6. Second, Defendant contends that even after considering additional evidence obtained through the deposition of Barbitta, the totality of information available still did not suggest any possible way in which the Lumbermans Policies would cover Bolton for damages he might be responsible for as a result of the Redwood City action.

² At the time of tender, the Redwood City Complaint and Amended Complaint alleged, in relevant part, that "On information and belief, dry cleaning operations conducted at Defendant's property have resulted in discharges of PCE, among other materials, to the sanitary sewer beneath El Camino Real. On information and belief, the contamination now impacting the Shopping Center, Defendant's property, and the subsurface beneath El Camino Real, was caused, at least in part, by discharges from the dry cleaning operations conducted at Defendant's property. Redwood City's investigation of other possible sources is on-going." Redwood City Complaint ¶¶ 9-10; Redwood City Amended Complaint ¶¶ 12-13.

1 Id. at 10. Finally, Lumbermans has included a single paragraph
2 arguing that the discharges occurred prior to the time when the
3 Lumbermans Policies became effective, and that Bolton is therefore
4 precluded from claiming any coverage under the policies. Id. at
5 18.

6 The Court disagrees. Looking back to the original time of
7 tender, Lumbermans was aware only of the Redwood City Complaint,
8 the Answer, and the terms of the Lumbermans Policies. Even after
9 Bolton again tendered his claim to Lumbermans over a year later,
10 no additional information had been uncovered bearing on the
11 question of whether the claim would ultimately be covered by the
12 Lumbermans Policies.

13 Looking to both the Redwood City Complaint and the Redwood
14 City Amended Complaint, it is clear that both employ extremely
15 broad language that can reasonably be read to encompass a means of
16 pollution that would fall within the scope of the policies. See
17 Redwood City Complaint, Redwood City Amended Complaint. Neither
18 document specifically identifies the means of contamination,
19 whether the contamination was sudden or gradual, or even who was
20 definitively responsible for the contamination. See Redwood City
21 Complaint ¶ 10; Redwood City Amended Complaint ¶ 13. While the
22 Court is well aware that it must refrain from engaging in
23 speculation so as to invent a cause of injury that would fall
24 within the coverage of the policy, see Gunderson v. Fire Ins.
25 Exchange, 37 Cal. App. 4th 1106 (Cal. Ct. App. 1995), so too must
26 Defendant recognize that the standard for avoiding the duty to
27 defend requires an insurer to conclusively establish that the
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1 claim cannot fall within the scope of the policy based upon the
2 information known at the time of tender. See STAEFA Control-
3 System Inc. v. St. Paul Fire & Marine Ins. Co., 847 F. Supp. 1460,
4 1467 (N.D. Cal. 1994). Even if it is true, as Defendant contends,
5 that "there is no fact alleged in the underlying litigation, nor
6 in the additional evidence, that there was a sudden and accidental
7 release by Bolton," that would not entitle Lumbermans to the
8 relief requested, especially at the summary judgment stage. See
9 Montrose, 6 Cal. 4th at 300; Maryland Cas. Co., 48 Cal. App. 4th
10 at 1832.

11 Similarly, even if Lumbermans is correct in its contention
12 that Barbitta's deposition did not assist Plaintiff's case by
13 revealing ways in which the contaminating chemicals suddenly and
14 accidentally entered the sewer, that fact would not suffice to
15 meet the burden placed on an insurer seeking to avoid its duty to
16 defend an insured. Rather, so long as Lumbermans is unable to
17 conclusively establish that the underlying claim cannot fall
18 within the ambit of the policies, it will be bound to defend
19 Plaintiff. See Montrose, 6 Cal. 4th at 295; Vann, 39 Cal. App.
20 4th at 1614.

21 Finally, with respect to Defendant's third argument--that the
22 contamination had to have occurred prior to the period covered by
23 the policies--the Court notes that Defendant has based its entire
24 argument on Barbitta's deposition testimony, who could not recall
25 ever having spilled hazardous chemicals into either of the two
26 drains connecting Roy's to the sewer line. See Def. Mem. at 18-
27 19. Because Barbitta testified that no such spillage occurred,
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1 the argument goes, the contamination could not possibly be within
2 the scope of the Lumbermans Policies because all other witnesses
3 who might have knowledge of the operations at Roy's are either
4 deceased or unable to competently testify. Id. The logical chasm
5 between the substance of Barbitta's testimony and the legal
6 conclusion deduced therefrom by Lumbermans is too great to be
7 bridged by mere inference, especially where, as here, all
8 inferences are to be drawn against Lumbermans as the moving party.
9 See Anderson, 477 U.S. at 255. Simply because Barbitta could not
10 recall an event having happened does not mean it conclusively did
11 not happen--to so find would be to credit Barbitta's testimony, a
12 determination precluded at the summary judgment phase--and it
13 certainly does not mean that the contamination, whatever its
14 cause, was conclusively outside the scope of the policies.
15 Accordingly, the Court declines to grant Defendant summary
16 judgment on this ground.

17 In addition to the foregoing, the Court notes several facts
18 that weigh against granting Defendant's motion. First, discovery
19 in the Redwood City action remains ongoing and the Court has not
20 been presented with any information by way of motion or otherwise
21 that would shed light on the source of the contamination or the
22 means by which the area under the shopping center came to be
23 contaminated. Second, the evidentiary record in the instant
24 matter is similarly sparse. Finally, Bolton has proffered the
25 affidavit of Paris A. Hajali, Ph.D., who has asserted that, in his
26 professional opinion, the source of the contamination is
27 inconclusive and might be attributable to more than one origin.

1 See Affidavit of Paris A. Hajali ("Hajali Aff."). While the Court
2 is aware that the possibility exists that the underlying claims
3 may well be shown eventually to be outside the scope of the
4 Lumbermans Policies, Defendant has not conclusively established
5 that fact, and certainly cannot prevail as a matter law, as it is
6 required to do at this stage. See Maryland Cas. Co., 48 Cal. App.
7 4th at 1832.

8 As for Defendant's claim that it is entitled to a judgment
9 declaring that its declination to defend Bolton was not made in
10 bad faith, the Court notes that Defendant's argument is premised
11 entirely on the presumption that the Court will find in
12 Lumbermans's favor on the duty to defend issue. See Def. Mem. at
13 19-20. Since the Court has found that Lumbermans does have a duty
14 to defend Bolton in connection with the Redwood City action,
15 Defendant's argument is without merit. Accordingly, the Court
16 declines to rule that Defendant's refusal to defend Bolton was not
17 made in bad faith. However, since Bolton has not made a
18 corresponding motion seeking a determination that the refusal was
19 in bad faith, and since the Court has not been presented with any
20 evidence bearing on this issue, the Court's ruling on the instant
21 motion is not a conclusive resolution of the bad faith issue,
22 which remains an open one in this dispute.

23 B. Bolton's Motion for Summary Judgment

24 Because the Court finds that Lumbermans has failed to
25 conclusively demonstrate by reference to undisputed facts that the
26 injuries complained of in the Redwood City action are outside the
27 scope of the Lumbermans Policies, the duty to defend has been
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1 established. See American Cyanamid Co. v. American Home Assur.
2 Co., 30 Cal. App. 4th 969, 975 (Cal. Ct. App. 1994), citing Horace
3 Mann Ins. Co., 4 Cal. 4th at 1085. The duty continues for only so
4 long as Lumbermans is unable to conclusively establish non-
5 coverage under the Lumbermans Policies, however, and Defendant
6 will therefore be afforded the opportunity to terminate its duty
7 if, at some point in the future, it can prove inapplicability of
8 the policy coverage to the claims alleged in the Redwood City
9 action. See Haskel, Inc. v. Sup. Ct., 33 Cal. App. 4th 963, 977-
10 78 (Cal Ct. App. 1995). Until that time, however, Lumbermans must
11 furnish Bolton with an adequate defense, including reasonable
12 costs incurred by Bolton up to the present in defending against
13 the Redwood City action. See Aerojet-General Corp. v. Transport
14 Indem. Co., 17 Cal. 4th 38, 64 (Cal. 1997).

15 **V. CONCLUSION**

16 California law imposes a broad duty on insurers to defend
17 their insured in connection with claims brought by third parties,
18 where, as here, the claims might potentially be covered by
19 insurance policies provided by insurers. This broad duty has been
20 well defined by both state and federal courts applying California
21 law for decades, and is undoubtedly considered by insurers when
22 determining policy premiums and limitations. While the Court is
23 aware that it must evaluate all available evidence in determining
24 whether the duty to defend applies, and may not engage in
25 speculation so as to create a phantom basis for coverage that
26 finds no support in the evidence, the Court is similarly aware of
27 the wide latitude and deference granted to an insured seeking to
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1 shift the burden of defending against a lawsuit to his insurer.
2 Where, as here, it cannot be said that the claims advanced by
3 Redwood City against Bolton will conclusively be outside the scope
4 of the Lumbermans Policies, the Court is bound to order Defendant
5 to defend Bolton against those claims until such time as
6 conclusive proof demonstrating non-coverage is proffered and
7 undisputed. Accordingly, Plaintiff's motion is GRANTED and
8 Defendant's motion is DENIED.

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10 IT IS SO ORDERED.

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12 Dated: January 23, 2006

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UNITED STATES DISTRICT JUDGE
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